BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MUOI HUE LY	)	
Claimant	)	
VS.	)	
	)	Docket No. 208,783
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on August 26, 1998. The Appeals Board heard oral argument on April 14, 1999.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared on behalf of claimant. D. Shane Bangerter of Dodge City, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The two issues on appeal are: (1) should claimant be limited to an award of medical expenses only because she was not disabled for one week from earning full wages, and (2) what is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified. Claimant is entitled to benefits for a 14 percent functional impairment for the period from August 10, 1995, through June 3, 1996, and a 51.25 percent work disability thereafter.

Findings of Fact

1. Claimant worked for respondent approximately ten years before the accident alleged in this case. During that ten years, claimant worked three jobs. Those jobs are identified in the report from Mr. James T. Molski as trim belt jobs. During most of her employment, she worked using an air knife trimming meat off the neck. Claimant is Vietnamese and the work for respondent is her only employment since coming to the United States.

2. In 1995, claimant began experiencing problems in both shoulders, arms, and hands. The parties have stipulated to an August 10, 1995, date of accident.

3. Claimant received authorized treatment from Dr. C. Reiff Brown and Dr. Pedro A. Murati.

4. Claimant missed work November 13, 1995, for an appointment with Dr. Brown. Claimant also missed February 12, 13, 15, and 16, 1996, due, at least in part, to pain and discomfort in her shoulders.

5. Claimant's injury was evaluated by three physicians. Dr. Murati found a loss of range of motion in the shoulders and mild crepitus on the left. He recorded his impression as "chronic shoulder, neck and both upper extremity complaints." He rated the combined problems as a 16 percent impairment of the whole body. He restricted against frequent use of the shoulders at a range which would require movement of the hands away from the body more than 18 inches and against frequent gripping and extension of the wrist under loads greater than 5 pounds.

Dr. Murati referred claimant to Dr. Brown. Dr. Brown diagnosed biceps and rotator cuff tendonitis of the shoulders, especially on the left, possible ulnar cubital tunnel and mild generalized tendonitis involving both hands. He rated the impairment as 13 percent of the left arm and 6 percent of the right. He restricted against frequent use of the hands above shoulder level, frequent use of hands away from the body more than 18 inches, and frequent gripping and extension of the wrists under loads greater than 5 pounds.

Dr. Aly M. Mohsen saw claimant at the request of claimant's counsel. He diagnosed: (1) bilateral bicipital and supraspinatus tendinitis and bursitis; (2) bilateral epicondylitis; (3) rotator cuff tendinitis and bursitis; and (4) tenosynovitis of the long flexors with the associated impingement syndrome. He rated the impairment as 14 percent of the whole person. He recommended claimant be assigned to modified duties with lifting limited to 10 to 15 pounds constantly and 15 to 20 pounds occasionally. He further recommended claimant limit repetitive use of hand tools to only an occasional basis and limit pushing, pulling, and lifting to 15 to 20 pounds at or above the shoulder level. In his deposition, he also indicated he would recommend claimant not work on a constant basis in temperatures lower than 68 degrees but acknowledged she could work in temperatures from 40 to 68 degrees if she wore sufficient clothing.

6. Because of the work restrictions given to claimant, respondent offered accommodated work. Respondent followed its normal practice of "touring." This procedure allowed claimant to tour the plant and, within certain limitations, identify jobs she believed she could perform. Claimant initially attempted a job which Mr. Benjamin Garcia, her supervisor, described as picking defects on a 50/50 line. In this job, claimant picked bones, cartilage, and any defect and placed them in a chute next to her. The belt runs about three and one-half feet high and is about two-feet wide. Claimant could sit or stand. The defects generally weigh two, three, or sometimes as much as four pounds. Mr. Garcia described the job as a repetitious one. Claimant eventually reported that this work was hurting her shoulder.

After claimant reported problems on the 50/50 line, respondent allowed claimant to tour a second time. From the second tour, claimant selected a job called "hind shank dropper." This job was similar to the previous job but it was on the 75/25 line and her chute was in front of her. Claimant performed this job two or three months before she again reported that it was bothering her shoulder.

Claimant a third time toured and chose a job called a "round trim separator." In this third accommodated job, claimant stood or sat on a chair or stool, again in front of a belt. This belt was approximately three-feet high and one-foot wide. She picked small pieces of fat from the belt and placed them in a chute. The pieces of fat weighed one-half pound or less. Mr. Garcia, claimant's supervisor, described this job as continuous, repetitious work.

The "round trim separator" job was the last position claimant held with respondent. According to Mr. Garcia, claimant had trouble with getting the work rejected. She was pulling the meat when she was supposed to be pulling the fat. Mr. Garcia confronted claimant and she said she could not do the job because her shoulders hurt and she could not work that fast. Claimant went on a three-week vacation and when she returned she worked four to five hours and again advised respondent she could not do the job. When claimant indicated she could not do the third job, she was terminated. This was in accordance with a company policy which limited the touring procedure to three chances. Claimant's last day of work for respondent was June 3, 1996.

7. Respondent's records indicate that the restrictions respondent was using for claimant were "[N]o work > 18" from body. No work > shoulder level. No lift > 5#. Only occasional repetitive work."

8. After leaving work for respondent, claimant moved to McPherson, Kansas. Claimant's husband had moved to McPherson earlier and was one of the owners of a restaurant there. Claimant testified that she applied at the Kwik Shop and at Sonic, as well as other fast food places, when she moved to McPherson. Claimant eventually went to work in her husband's restaurant. Claimant initially testified she started at the restaurant in February 1997. The evidence, including video taken, indicates claimant did work for the restaurant before February 1997 at least on an occasional basis. She ran the cash register,

seated customers, and performed various other duties to help out. But claimant did not begin to be paid for the work until February 1997. She was paid $5.15 per hour and worked 20 to 30 hours per week.

9. Mr. Molski prepared a list of the tasks claimant performed in the 15 years before her injury. Dr. Mohsen agreed with Mr. Molski's conclusion that claimant has a 46.5 percent time-weighted task loss. This is the only task loss opinion by a physician in evidence.

Conclusions of Law

1. The Board concludes claimant is entitled to permanent partial disability benefits and is not limited to medical compensation only. Respondent contends claimant should be limited to medical benefits in accordance with K.S.A. 44-501(c) as applied in *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198 (1996). The then applicable version of K.S.A. 44-501(c) provided that the employer was only liable for medical expenses unless the injury disabled the employee from earning full wages for at least one week:

> Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

For two reasons the Board disagrees with respondent's position on this issue. First, the Board finds claimant did miss five days due to the injury. This includes November 13, 1995, for the appointment with Dr. Brown. For this date, respondent contends claimant could have returned and worked part of that day. But according to claimant's testimony, the combination of the trip, waiting for the doctor, and the examination itself used the full day. In any event, this was a day when claimant would not have earned full wages. Claimant also missed February 12, 13, 15, and 16, 1996. For these days, respondent contends claimant was taken off work by Dr. Thomas M. Tran of Wichita, Kansas, for other reasons. But claimant testified she was off because of her shoulders and the note from Dr. Tran suggests this was at least one of the reasons she was taken off work. The Board concludes claimant was disabled for one week from earning full wages based on this time alone. Second, claimant was assigned permanent restrictions because of this injury. The restrictions required that claimant change the work she was doing. The statute limits the benefits only if the employee continues at the work at which she was employed. Claimant did not, and this provides a second reason she is not limited to medical compensation only.

2. The Board finds claimant was not able to do the accommodated work in the positions respondent provided. This conclusion is based on claimant's testimony and, to some extent, a comparison of the restrictions with the work. In the last position, claimant's supervisor acknowledged the work was continuously repetitive work. This violated the

restrictions. There were certainly circumstances which suggest claimant did not, for reasons other than the injury, want to work for respondent. Her husband had moved to McPherson. Her supervisor had the impression she did not want to work for respondent. And the Board considers claimant's testimony to be less than candid in some respects.[1] Nevertheless, the testimony that she could not continue to do the offered work is, in our opinion, credible in light of the restrictions and the type of work involved. Respondent offers no medical opinion which compares the work to the restrictions. The Board accepts as true claimant's conclusion that she could not continue to do the work offered by respondent. Claimant attempted the work but could not do it.

3. Claimant is entitled to work disability. K.S.A. 1995 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. Claimant did not make a good faith effort to find work between the time she left respondent and the time she began receiving pay for the work she performed at her husband's restaurant. A wage should be imputed. The Board finds the $5.15 per hour claimant earned working for her husband's restaurant to be reasonable wage but also concludes the wage should be imputed on a 40-hour per week basis. Claimant has limited education, 9th grade in Vietnam, and limited work experience, her work for respondent being the only work she has done in the U.S. The $5.15 per hour is a reasonable hourly wage to impute but she is not limited to only 20 to 30 hours per week, and the Board finds

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[1] Specifically, the Board does not consider her testimony about whether she was working for her husband's restaurant to be completely candid. She denied working there when in fact she was working but apparently not being paid.

the imputed wage should be based on full-time or 40 hours per week. The imputed wage is, therefore, $206. For purposes of calculating work disability, the Board concludes this wage should be imputed from the date claimant left employment and continue after claimant started being paid on a part-time basis.

6. Claimant has a 56 percent wage loss. This is computed by comparing the average weekly wage of $471.31, which became effective as of claimant's termination from respondent, with the imputed wage of $206 per week.

7. The Board agrees with and affirms the finding by the ALJ that claimant has a 14 percent functional impairment. This is based on the opinion of Dr. Mohsen which falls between the ratings by Dr. Brown and Dr. Murati.

8. Claimant is entitled to benefits only for the functional impairment for the period from the stipulated date of accident, August 10, 1995, and her last day of work for respondent, June 3, 1996. During that period, claimant continued to earn a wage which was the same or higher than the wage she was earning on the date of the injury. The disability is, therefore, limited by statute to the functional impairment. K.S.A. 44-510e.

9. Claimant has a task loss of 46.5 percent. This is based on the opinion of Dr. Mohsen, the only physician to give a task loss opinion. Other opinions expressed by Mr. Molski are rejected because the statute requires that the task loss be "in the opinion of the physician." K.S.A. 44-510e.

10. Averaging the task loss of 46.5 percent with the wage loss of 56 percent, as required by K.S.A. 44-510e, the Board finds claimant has a 51.25 percent work disability and is entitled to benefits based on the work disability as of her termination from respondent on June 3, 1996.

11. During the 42.57 weeks from the date of accident (August 10, 1995) to the date claimant's employment was terminated (June 3, 1996), claimant would be entitled to benefits at the rate of $285.27 per week based on the stipulated wage, for that period, of $427.88, for a 14 percent disability based on functional impairment. The 14 percent disability would actually calculate to over 58 weeks of benefits but there are only 42.57 weeks in the period.

As of June 4, 1996, the disability becomes a work disability of 51.25 percent which would entitle claimant to 212.69 weeks less the 42.57 weeks already paid, or 170.12 weeks, at the new rate of $314.22. The change in the rate is because of the stipulated change in the average weekly wage as of the date of termination.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on August 26, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Muoi Hue Ly, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury which occurred August 10, 1995, and based upon an average weekly wage of $427.88, from the date of accident until claimant's termination on June 3, 1996, and $471.31 per week thereafter, for 42.57 weeks at the rate of $285.27 per week or $12,143.94 for a 14% permanent partial disability, followed by 170.12 weeks at the rate of $314.22 or $53,455.11 for a 51.25 percent work disability, making a total award of $65,599.05, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
D. Shane Bangerter, Dodge City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director